Teh Poh Hong & Anor v Kejuruteraan Hock Kheng Sdn Bhd

HIGH COURT (PENANG) — SUIT NO PA-22NCvC-51–03 OF 2022
QUAY CHEW SOON J
21 NOVEMBER 2022

Contract — Agreement — Sale and purchase agreement ('SPA') — Supplemental agreement ('SA') — Property destroyed by fire before completion of SPA — Parties entered into SA for purpose of reconstruction and restoration of property — Plaintiffs sought order that defendant to deliver vacant possession together with consent and approval from relevant authority for purpose of any work including but not limited to building work, planning as well as building plan for factory — Defendant counterclaimed plaintiffs' failure or refusal to obtain planning permission and approved building plan precluded defendant from carrying out reconstruction and restoration works of factory — Whether vacant possession delivered by defendant to plaintiffs — Whether plaintiffs required to apply for planning permission and approved building plan as pre-condition before defendant carried out reconstruction and restoration work of factory — Whether plaintiffs, in failing or refusing to apply for planning permission and approved building plan, had breached SA causing it to be impossible to perform where SA ought to be terminated — Whether plaintiffs required to pay defendant balance purchase price under SPA

The defendant had agreed to sell and the plaintiffs agreed to purchase a property ('the land') together with a factory erected thereon ('the factory'). Prior to the completion of the sale and purchase agreement ('SPA'), the factory was destroyed by fire. The parties agreed to proceed with the completion of the SPA on the basis that the defendant would reconstruct the factory. They then entered into a supplemental agreement ('SA') for the purpose of reconstruction and restoration of the factory. The plaintiffs filed the instant suit to compel the defendant to deliver vacant possession of the factory together with consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan for Parts A, B, C and D of the factory to the plaintiffs. According to the defendant, based on the provisions of the SPA and the SA, it was agreed that the plaintiffs were required, at their own expense, to apply for planning permission and get the building plan approved by the local authority in order for the defendant to rebuild the factory. The defendant counterclaimed against the plaintiffs as follows: (a) the plaintiffs' failure or refusal to obtain planning permission and approved building plan had precluded the defendant from carrying out the reconstruction and restoration works of the factory; (b) such failure or refusal on the part of the plaintiffs amounted to a fundamental breach of the SA and the SA ought to be terminated; and (c) the balance purchase price of

RM250,000 ('the balance purchase price') under the SPA, that was withheld by the plaintiffs' solicitor as stakeholder, ought to be released to the defendant. The issues for determination were: (i) whether vacant possession of Part A of the factory was delivered by the defendant to the plaintiffs; (ii) whether the plaintiffs were required to apply for planning permission and approved building plan as a pre-condition before the defendant carried out the reconstruction and restoration work of the factory; (iii) whether the plaintiffs, in failing or refusing to apply for planning permission and approved building plan, had breached the SA causing it to be impossible to perform where the SA ought to be terminated; and (iv) whether the plaintiffs were required to pay, or procure to be paid, to the defendant the balance purchase price under the SPA.

Held, dismissing the plaintiffs' claim and allowing the defendant's counterclaim:

(1) The declaratory order sought by the plaintiffs ie that the plaintiffs had rights and interest over the land and the factory and were entitled to enjoy the exclusive use and possession of the factory was academic because there was no dispute over the ownership of the land and the factory. As such, the declaration sought by the plaintiffs served no utility and ought not to be granted. In any event, Part A of the factory had been delivered to the plaintiffs at all material times. The second plaintiff's testimony showed that the plaintiffs did not claim vacant possession of Part A of the factory and the plaintiffs actually intended to claim compensation of RM1,500 per day, without mentioning vacant possession of Part A of the factory. The plaintiffs' claim for vacant possession of Part B of the factory was premature as pursuant to the SA, the defendant was not required to deliver vacant possession of Part B of the factory as of the date of filing of the suit. Due to the plaintiffs' failure to testify that they were claiming for Part A and Part B of the factory, it was inferred that vacant possession of Part A and Part B of the factory had been delivered to the plaintiffs. The delivery of vacant possession of Part C and Part D of the factory was subject to the satisfaction of cl 2(a) of the SA ie the reconstruction and restoration of Part C and Part D of the factory. However, the defendant was unable to reconstruct Part C and D of the factory due to the plaintiffs' failure or refusal to obtain the requisite planning permission and approved building plan, as required under cl 10.1 of the SPA (see paras 17, 19 & 22–24).

(2) Based on cl 10.1 and 10.2 of the SPA, the responsibility to apply for planning permission and approved building plan in respect of the reconstruction of the factory lied on the plaintiffs. Such requirements must be complied with by and at the expense of the plaintiffs. The SA did not vary or alter the provisions of the SPA and hence the provisions remained in full force and effect and binding on the parties. There was no provision in the SPA nor the SA that required the defendant to apply

for planning permission and approval of building plan. Thus, it was the plaintiffs' responsibility to apply for the same under cl 10.1 of the SPA. The plaintiffs could not compel the defendant to do so (see paras 35–36 & 45).

(3) It was due to the breach of the plaintiffs that the defendant was not obliged to perform its covenant to rebuild the factory. The plaintiffs' failure or refusal to apply for the requisite planning permission and approval of building plan had prevented the defendant from carrying out the reconstruction and restoration of the factory. The SA could not be performed nor continued due to the plaintiffs' failure or refusal to apply for the planning permission and approval of building plan. The plaintiffs could not take advantage of their own breach. Due to the breach by the plaintiffs, the defendant was entitled to put an end to the SA. The SA was thus terminated (see paras 49, 54, 57 & 59).

(4) Owing to the plaintiffs' breach of cl 10.1 of the SPA, they were precluded from claiming any damages from the defendant by making any deduction of the LAD from the balance purchase price, taking advantage of their own wrong. By failing or refusing to obtain the requisite planning permission and approved building plan, the plaintiffs were not entitled to claim the LAD that was to be deducted from the balance purchase price. Moreover, upon the SA being put to an end, it followed that the balance purchase price withheld must be released to the defendant (see paras 64 & 66).

(5) Since the plaintiffs were not enforcing the SA by compelling the defendant to rebuild the factory, the issue of enforceability of the SA in terms of the defendant's covenant to reconstruct the factory was irrelevant. Next, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('COVID-19 Act') could apply to the SA. Under the SA, the defendant undertook to reconstruct the factory that made it a construction work contract within the ambit of the COVID-19 Act (see paras 95–96).

[Bahasa Malaysia summary

Defendan telah bersetuju untuk menjual dan plaintif telah bersetuju untuk membeli satu hartanah ('tanah') bersama dengan sebuah kilang yang didirikan di atasnya ('kilang'). Sebelum perjanjian jual beli ('SPA') selesai, kilang tersebut telah musnah akibat kebakaran. Pihak-pihak telah bersetuju untuk meneruskan penyelesaian SPA dengan syarat bahawa defendan akan membina semula kilang tersebut. Mereka kemudian memasuki satu perjanjian tambahan ('SA') untuk tujuan pembinaan semula dan pemulihan kilang. Plaintif telah memfailkan tuntutan ini untuk mendesak defendan menyerahkan milikan kosong bagi kilang bersama dengan persetujuan dan kelulusan dari pihak berkuasa yang berkaitan untuk tujuan apa-apa kerja termasuk tetapi tidak

terhad kepada kerja-kerja pembinaan, perancangan serta pelan bangunan untuk Bahagian A, B, C dan D kilang kepada plaintif. Menurut defendan, berdasarkan peruntukan SPA dan SA, telah dipersetujui bahawa plaintif dikehendaki, dengan perbelanjaan mereka sendiri, untuk memohon kebenaran merancang dan mendapatkan pelan bangunan yang diluluskan oleh pihak berkuasa tempatan supaya defendan boleh membina semula kilang. Defendan telah menuntut balas terhadap plaintif seperti berikut: (a) kegagalan atau penolakan plaintif untuk mendapatkan kebenaran merancang dan pelan bangunan yang diluluskan telah menghalang defendan daripada meneruskan kerja-kerja pembinaan semula dan pemulihan kilang; (b) kegagalan atau penolakan tersebut di pihak plaintif merupakan pelanggaran asas terhadap SA dan SA seharusnya ditamatkan; dan (c) baki harga pembelian RM250,000 ('baki harga pembelian') di bawah SPA, yang dipegang oleh peguam plaintif sebagai pemegang amanah, seharusnya diberikan kepada tertuduh. Isu-isu untuk penentuan adalah: (i) sama ada milikan kosong Bahagian A kilang telah diserahkan oleh defendan kepada plaintif; (ii) sama ada plaintif dikehendaki untuk memohon kebenaran merancang dan pelan bangunan yang diluluskan sebagai pra-syarat sebelum defendan melaksanakan kerja-kerja pembinaan semula dan pemulihan kilang; (iii) sama ada plaintif, dalam gagal atau menolak untuk memohon kebenaran merancang dan pelan bangunan yang diluluskan, telah melanggar SA menyebabkan ia menjadi mustahil untuk dilaksanakan di mana SA seharusnya ditamatkan; dan (iv) sama ada plaintif dikehendaki membayar, atau mendapatkan untuk dibayar, kepada defendan baki harga pembelian di bawah SPA.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Perintah pengisytiharan yang dipohon oleh plaintif iaitu bahawa plaintif mempunyai hak dan kepentingan ke atas tanah dan kilang serta berhak untuk menikmati penggunaan dan pemilikan eksklusif kilang adalah akademik kerana tidak ada pertikaian mengenai pemilikan tanah dan kilang. Oleh itu, pengisytiharan yang dipohon oleh plaintif tidak memberi sebarang faedah dan seharusnya tidak diberikan. Dalam apa jua keadaan, Bahagian A kilang telah diserahkan kepada plaintif pada semua masa material. Keterangan plaintif kedua menunjukkan bahawa plaintif tidak menuntut milikan kosong Bahagian A kilang dan sebenarnya plaintif berniat untuk menuntut pampasan sebanyak RM1,500 sehari, tanpa menyebut milikan kosong Bahagian A kilang. Tuntutan plaintif untuk milikan kosong Bahagian B kilang adalah terlalu awal kerana mengikut SA, defendan tidak dikehendaki menyerahkan milikan kosong Bahagian B kilang pada tarikh pemfailan tuntutan. Disebabkan kegagalan plaintif untuk memberi keterangan bahawa mereka menuntut Bahagian A dan Bahagian B kilang, telah disimpulkan bahawa milikan kosong Bahagian A dan Bahagian B kilang

telah diserahkan kepada plaintif. Penyerahan milikan kosong Bahagian C dan Bahagian D kilang tertakluk kepada penyelesaian klausa 2(a) SA iaitu pembinaan semula dan pemulihan Bahagian C dan Bahagian D kilang. Namun, defendan tidak dapat membina semula Bahagian C dan D kilang disebabkan kegagalan atau penolakan plaintif untuk mendapatkan kebenaran perancangan dan pelan bangunan yang diperlukan, seperti yang dikehendaki di bawah klausa 10.1 SPA (lihat perenggan 17, 19 & 22–24).

(2) Berdasarkan klausa 10.1 dan 10.2 SPA, tanggungjawab untuk memohon kebenaran perancangan dan pelan bangunan yang diluluskan berkenaan dengan pembinaan semula kilang terletak pada plaintif. Keperluan tersebut mesti dipatuhi oleh dan atas perbelanjaan plaintif. SA tidak mengubah atau meminda peruntukan SPA dan dengan itu, peruntukan tersebut kekal dalam kuasa penuh dan berkesan serta mengikat pihak-pihak. Tiada peruntukan dalam SPA mahupun SA yang memerlukan defendan untuk memohon kebenaran perancangan dan kelulusan pelan bangunan. Oleh itu, adalah tanggungjawab plaintif untuk memohon perkara yang sama di bawah klausa 10.1 SPA. Plaintif tidak boleh mendesak defendan untuk berbuat demikian (lihat perenggan 35–36 & 45).

(3) Disebabkan pelanggaran oleh plaintif, defendan tidak terikat untuk melaksanakan perjanjian untuk membina semula kilang. Kegagalan atau penolakan plaintif untuk memohon kebenaran perancangan yang diperlukan dan kelulusan pelan bangunan telah menghalang defendan daripada melaksanakan pembinaan semula dan pemulihan kilang. SA tidak dapat dilaksanakan atau diteruskan disebabkan oleh kegagalan atau penolakan plaintif untuk memohon kebenaran perancangan dan kelulusan pelan bangunan. Plaintif tidak boleh mengambil kesempatan di atas pelanggaran mereka sendiri. Disebabkan pelanggaran oleh plaintif, defendan berhak untuk menamatkan SA. Oleh itu, SA telah ditamatkan (lihat perenggan 49, 54, 57 & 59).

(4) Oleh kerana pelanggaran plaintif terhadap klausa 10.1 SPA, mereka telah dihalang daripada menuntut sebarang ganti rugi daripada defendan dengan membuat sebarang potongan LAD dari baki harga pembelian, mengambil kesempatan di atas kesalahan mereka sendiri. Dengan gagal atau menolak untuk mendapatkan kebenaran perancangan yang diperlukan dan pelan bangunan yang diluluskan, plaintif tidak berhak untuk menuntut LAD yang sepatutnya dipotong dari baki harga pembelian. Tambahan pula, setelah SA ditamatkan, adalah jelas bahawa baki harga pembelian yang dipegang mesti diberikan kepada tertuduh (lihat perenggan 64 & 66).

(5) Oleh kerana plaintif tidak menguatkuasakan SA dengan mendesak defendan untuk membina semula kilang, isu kebolehkuatkuasaan SA

dari segi perjanjian defendant untuk membina semula kilang adalah tidak relevan. Selanjutnya, Akta Langkah-langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta COVID-19') boleh terpakai kepada SA. Di bawah SA, defendan telah berjanji untuk membina semula kilang yang menjadikannya sebagai kontrak kerja pembinaan dalam konteks Akta COVID-19 (lihat perenggan 95–96).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)

Cahaya Utama Industries Sdn Bhd v Kong Kam Peng [2007] 8 MLJ 528, HC (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766; [2014] 9 CLJ 733, FC (folld)

Leong Ah Kew v Prisma Suria Sdn Bhd [2015] MLJU 713; [2015] 8 CLJ 300, HC (refd)

Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)

Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (folld)

Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282; [2016] 6 CLJ 346, FC (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (folld)

Senik v Hassan & Anor [1963] 1 MLJ 368b (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131, CA (folld)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] CLJ Rep 363, FC (refd)

Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)

Legislation referred to

Contracts Act 1950 ss 40, 54, 55, 68

Evidence Act 1950 s 101

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 7

Town and Country Planning Act 1976 ss 2, 19, 21(2)

Lim Kian Leong (with Lim Ee Theng) (Lim, Ho, Cheong & Lok) for the plaintiffs.
Cheong Yew Sheng (with Hee Ying Peng) (Wong & Loh) for the defendant.

Quay Chew Soon J:

INTRODUCTION

[1] This suit involves a property known as Lot 288 held under Geran Mukim No 207, Mukim 3, Daerah Seberang Perai Selatan, Negeri Pulau Pinang measuring approximately 24,255.1656 sqmt ('land'), together with a unit of factory measuring approximately 100,000 sqft bearing an address at PMT 366, Jalan Tasek, Dua Kongsi, 14200 Sungai Jawi, Pulau Pinang erected thereon ('factory').

[2] The plaintiffs seek a declaration that they have rights and interest over the land and the factory. And that they are entitled to enjoy the exclusive use and possession of the factory, including but not limited to carrying on and continuing their business in the factory. They seek an order that the defendant ('D') delivers vacant possession together with consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan for Parts A, B, C and D of the factory to the plaintiffs immediately.

[3] D's defence is essentially two-fold. Firstly, vacant possession of Part A of the factory has already been delivered to the plaintiffs. Secondly, D is not responsible for obtaining planning permission and approval of building plan for the reconstruction of the factory because that is the plaintiffs' responsibility.

[4] D has a counterclaim against the plaintiffs as follows. The plaintiffs' failure or refusal to obtain planning permission and approved building plan has precluded D from carrying out the reconstruction and restoration work of the factory. Further, such failure or refusal on the part of the plaintiffs amounts to a fundamental breach of the supplemental agreement dated 5 August 2021 ('supplemental agreement'). Accordingly, the supplemental agreement ought to be terminated. The balance purchase price of RM250,000 ('balance purchase price') under the Sale and Purchase Agreement dated 28 May 2021 ('SPA'), that is withheld by the plaintiffs' solicitor as stakeholder, ought to be released to D.

[5] After a full trial, I dismissed the plaintiffs' claim and allowed D's counterclaim. Here are the grounds of my judgment.

TRIAL

[6] The witnesses who testified at the trial were:

Witness	Name	Description

For the plaintiffs		
PW1	Ch'ng Cheng Hai	Second plaintiff ('P2')
PW2	Choong Yit Chuan	The plaintiffs' solicitor who prepared the SPA and the supplemental agreement
For the defendant		
DW1	Tan Eng Siang	Director of D

BACKGROUND FACTS

[7] On 28 May 2021 via the SPA, D (as vendor) agreed to sell and the plaintiffs (as purchasers) agreed to purchase the land with the factory erected thereon.

[8] On 7 July 2021 and prior to the completion of the SPA, the factory was destroyed by fire ('fire'). Under cl 22 of the SPA, the risk and the loss arising from the Fire lies on D. Under cl 9(e) of the SPA, the land and the factory shall be delivered on the completion date in substantially the same condition as it is at the date of the SPA, fair wear and tear excepted. Under cl 21 of the SPA, in the event of any material change in the condition of the land and the factory between the date of the SPA and the date of delivery of vacant possession, D shall upon notification by the plaintiffs make good the same at D's cost and expense.

[9] The parties agreed to proceed with completion of the SPA on the basis that D will reconstruct the factory. They entered into the supplemental agreement for the purpose of reconstruction and restoration of the factory.

[10] The supplemental agreement provides as follows:

(a) vacant possession of Part A of the factory shall be delivered by D to the plaintiffs on or before 30 September 2021 (cl 1(a));

(b) vacant possession of Part B of the factory shall be delivered by D to the plaintiffs on or before 27 May 2022 (cl 1(b));

(c) vacant possession of Part C and Part D of the factory shall be delivered by D to the plaintiffs on or before 30 November 2021 ('Cut-Off Date') (cl 1(c));

(d) D shall perform and complete the following reconstruction and restoration works at his own cost and expense before the Cut-Off Date (cl 2(a)):

(i) D shall replace all pillars and columns damaged by the Fire between Part B and Part C of the factory on or before the Cut-Off Date (cl 2(a)(i));

(ii) D shall complete the reconstruction and restoration of Part C and Part D of the factory according to the agreed plan and materials on or before the Cut-Off Date subject to the following arrangement (cl 2(a)(ii)):

(aa) D shall complete the welding and fabrication works in respect of Part C and Part D of the Factory on or before 31.10.2021 notwithstanding any movement control order, lock down or restrictive measures imposed by the Government;

(bb) D shall commence the installation works immediately after the completion of the welding and fabrication works.

However the plaintiffs agree to extend the Cut-Off Date in the event any movement control order, lock down or restrictive measures imposed by the Government on the area on which the Land is located which directly affects the installation works.

Such period shall be excluded from the computation of the Cut-Off Date provided that all fabrication works in respect of the reconstruction of Part C and Part D of the Factory have been completed in accordance with the agreed plan and materials on or before 31.10.2021.

[11] Under cl 2(d) of the supplemental agreement, the plaintiffs' solicitor withheld the balance purchase price as stakeholder. Under cl 2(c) of the supplemental agreement, D agreed to pay the plaintiffs compensation at the sum of RM1,500 per day ('LAD') for each day of delay in delivering Part C and Part D of the factory together with completion of the reconstruction and restoration works. It was agreed that the LAD will be deducted from the balance purchase price.

[12] According to D, based on the provisions of the SPA and the supplemental agreement, it was agreed that the plaintiffs are required, at their own expense, to apply for planning permission and get the building plan approved by the local authority in order for D to rebuild the factory. D avers that the plaintiffs have breached the SPA and the supplemental agreement when they failed or refused to obtain planning permission and approved building plan, thereby preventing D from reconstructing the factory. Instead, the plaintiffs filed the instant suit to compel D to deliver vacant possession of the factory together with consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan for Parts A, B, C and D of the factory to the plaintiffs.

ISSUES TO BE TRIED

[13] The main issues to be determined in the present suit are:

(a) whether vacant possession of Part A of the factory was delivered by D to the plaintiffs;

(b) whether the plaintiffs are required to apply for planning permission and approved building plan as a pre-condition before D carries out the reconstruction and restoration work of the factory;

(c) whether the plaintiffs, in failing or refusing to apply for planning permission and approved building plan, have breached the supplemental agreement causing it to be impossible to perform whereby the supplemental agreement ought to be terminated; and

(d) whether the plaintiffs are required to pay, or procure to be paid, to D the RM250,000 balance purchase price under the SPA.

[14] I will deal with each of them in turn.

Whether vacant possession of Part A of the factory was delivered by the defendant to the plaintiffs

[15] In para 12.1 of the amended statement of claim ('SOC'), the plaintiffs prayed for the following:

(a) a declaration that the plaintiffs shall have rights and interest towards the land and the factory and are entitled to enjoy the exclusive use and possession of the factory, including but not limited to carrying on and continuing with the business of plaintiffs in the factory; and

(b) D shall:

(i) deliver vacant possession together with

(ii) consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan

for Parts A, B, C and D of the factory to the plaintiffs immediately.

[16] It is noted that the plaintiffs did not seek an order for specific performance to compel D to perform the reconstruction and restoration works under the supplemental agreement. The significance of this will be discussed later on in the judgment.

[17] I agree with D that the declaratory order sought by the plaintiffs via para 12.1 of the SOC (ie that the plaintiffs have rights and interest over the land and the factory and are entitled to enjoy the exclusive use and possession of the factory) is academic. The reason is simply because there is no dispute over the ownership of the land and the factory. D does not challenge the plaintiffs' ownership of the land and the factory. Nor their right to exclusive use and possession of the factory. As such, the declaration sought by the plaintiffs serves no utility and ought not to be granted.

[18] I follow the Federal Court decision in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766 at p 777; [2014] 9 CLJ 733 at p 746

which said:

> [27] We shall now deal with question (2) posed in this appeal. We are of the view if question (1) is answered in the affirmative and the plaintiff's right to recovery of damages barred by limitation, the *declarations sought by the plaintiff were futile. The grant of declaration is in the discretion of the court. The court will not act in vain and grant declarations that are of no utility or in regard to matters which are no longer 'live issue' or has become academic.* In support of this proposition we would refer to the following passage of the judgment of Wan Adnan J (as he then was) in *Douglas A Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307 at p 308; [1990] 2 CLJ 391; [1990] 2 CLJ Rep 24 at p 26 as follows:
>
> > The *power of the court to make a declaratory judgment is discretionary*. The court will not make a declaratory judgment when the question raised is purely academic. The court should not be required 'to answer academic question' — *Howard v Pickford Tools Ltd* [1951] 1 KB 417. Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and *would not give him 'relief' in any real sense, that is relieve him of any liability or disadvantage or difficulty:*

Part A of the factory

[19] In any event, I accept D's averment that Part A of the factory has been delivered to the plaintiffs at all material times. The second plaintiff's ('P2') testimony via his witness statement (WS-PW1) shows that the plaintiffs did not claim vacant possession of Part A of the factory. There is nothing in WS-PW1 which reveals that the plaintiffs are claiming for vacant possession of Part A of the factory. In fact, Q&A 9 of WS-PW1 shows that the plaintiffs actually intended to claim compensation of RM1,500 per day, without mentioning vacant possession of Part A of the factory.

[20] The only instance where failure to deliver vacant possession is mentioned by P2 in WS-PW1, it was in the context of Part C and Part D of the factory. Q&A 6 of WS-PW1 speaks of 'Defendant's failure to deliver vacant possession of Parts C and D of the factory together with its completion works by 30 November 2021 as stipulated in the supplemental agreement'.

[21] Interestingly, the plaintiffs' counsel's letter of demand dated *14 December 2021* never demanded for vacant possession of Part A of the factory. Notwithstanding that prior to the said letter of demand, D is required to deliver vacant possession of Part A of the factory on or before *30 September 2021* pursuant to cl 1(a) of the supplemental agreement.

Part B of the factory

[22] The plaintiffs' claim for vacant possession of Part B of the factory, in my opinion, is premature. Pursuant to cl 1(b) of the supplemental agreement, vacant possession of Part B of the factory is to be delivered on 27 May 2022. However, this action was commenced before that on *17 March 2022*, about two months earlier. In other words, D was not required to deliver vacant possession of Part B of the factory as of the date of filing of the instant suit.

[23] Moreover, P2's testimony in WS-PW1 did not show that the plaintiffs are claiming vacant possession of Part A or Part B of the factory, but only claiming the LAD. Due to the plaintiffs' failure to testify that they are claiming for Part A and Part B of the factory, I infer that vacant possession of Part A and Part B of the factory has been delivered to the plaintiffs.

Part C and Part D of the factory

[24] The delivery of vacant possession of Part C and Part D of the factory (which is to be on or before 30 November 2021 pursuant to cl 1(c) of the supplemental agreement) is subject to the satisfaction of cl 2(a) of the supplemental agreement. Namely, the reconstruction and restoration of Part C and Part D of the factory. But D is unable to reconstruct Part C and Part D of the factory due to the plaintiffs' failure or refusal to obtain the requisite planning permission and approved building plan, as required under cl 10.1 of the SPA.

[25] Furthermore, I agree with D that the time for delivery of vacant possession of the factory (as stipulated in the supplemental agreement) is no longer of essence and has become at large. I refer to the Federal Court case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 at p 156; [1983] CLJ Rep 363 at pp 370–371 which said:

> However, the rules contained in s 56 of the Contracts Act are not different from the position arrived at in common law. *Yeoh Kin Pong Realty Ltd v Ng Kim Pong* [1962] 1 MLJ 118 at 126. The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. *If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large.* Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion (See Hudson, pp 604 & 612). If this is done there would be a date from which liquidated damages could be calculated. In the present appeal, at no time did the respondent give notice to the appellant. Hence cll 20 and 21 cannot be enforced.

[26] The truth of the matter is that D does not challenge the plaintiffs' right and entitlement to the use and possession of the factory. D is simply resisting the plaintiffs' claim to compel them to deliver 'consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan for Parts A, B, C and D of the factory'.

[27] The question then is this — who is contractually obligated to apply for the said consent and approval from the relevant authority in relation to the reconstruction of the factory? My answer — the plaintiffs. I will deal with this question next.

Whether the plaintiffs are required to apply for planning permission and the approved building plan as a pre-condition before the defendant carries out the construction work of the factory

[28] The relevant contractual provisions of the SPA and the supplemental agreement are reproduced below.

(a) cl 9(g) of the SPA — Conditions of Sale:

> The sale and purchase of the said property shall be subject to the following conditions:
>
> (g) The *Certificate of Fitness for Occupation*/Certificate of Completion and Compliance in respect of the said factory more particularly described in Section 4 of the First Schedule has been issued by the relevant authority.

(b) cl 10.1 of the SPA — Governmental and Local Body requirements:

> The said property is open to inspection and the *Purchaser shall be held to have had notice* of all notices reservations road widening schemes and *requirements of the Government and the local authority* and *all such* notices reservations schemes and *requirements shall be complied with by and at the expense of the Purchaser.*

(c) cl 10.2 of the SPA:

> The said property is likewise sold subject to road deviation or widening drainage or improvements or other schemes or *matter affecting the said property* and the *Purchaser shall be deemed to have had full knowledge* of the nature and effect thereof and shall make no objection or requisition in respect thereof.

(d) cl 3 of the supplemental agreement — Validity of Principal Agreement:

> Subject only to the variation and addition herein contained and such other alterations if any, as may be necessary to make the Principal Agreement consistent with this Supplemental Agreement, the *Principal Agreement shall remain in full force and effect* and shall be read and construed and be

enforceable as if the terms and conditions of this Supplemental Agreement were inserted therein by way of addition or substitution as the case may be.

[29] In construing and interpreting the SPA and the supplemental agreement, I am guided by the following Court of Appeal decisions which dealt with the construction of contractual documents.

[30] In *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 at p 44; [2004] 3 CLJ 96 at 103–104, the Court of Appeal said:

> Thus when read together, the agency agreement, the supplementary agreement and the circulars sufficiently create an entitlement in the plaintiff's favour of an overriding commission in respect of Group Scheme policies of insurance. It would be noticed that we have in arriving at our aforesaid conclusion *made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract* between the parties. This is because the construction of a *contract is a question of law for determination by the court* and not by witnesses through their oral evidence.
>
> *As Lord Diplock observed in Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514*:*
>
> > In a case which turns, as this one does, on the construction to be given to a written document, a *court called on to construe the document* in the absence of any claim to rectification, *cannot be bound by any concession made by any of the parties as to what its language means*. That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the *construction of a written document is a question of law.* It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[31] In *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 at p 139, the Court of Appeal said:

> [27] It is axiomatic that it is the *duty of the Court to give effect to the clear intention of the parties as expressed in Clause 5(b) of the agreement which is in clear, unambiguous and unmistakable language*. In the *Central Bank of India Ltd* AIR 1965 SC 1288, it was held that:
>
> > Now it is commonplace that it is the *court's duty to give effect to the bargain of the parties according to their intention* and when that bargain is in writing the *intention is to be looked for in the words used* unless they are such that one may suspect that they do not convey the intention correctly. If those *words are clear, there is very little that the court has to do.* The *court must give effect to the plain meaning of the words* however much it may dislike the result.

[32] In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585

at p 599; [2005] 2 CLJ 596 at 613, the Court of Appeal said:

> The clauses in the sale and purchase agreement are complete and *unambiguous in their terms that there can be no other construction* possible then the one which was held by the learned judge. Lord Cottenham LC in *Llyod v Llyod* [1837] 2 My & Cr 192, 202 once said: 'If the provisions are clearly expressed, and there is *nothing to enable the court to put upon them a construction different from that which the words import*, no doubt the words must prevail.'

[33] Under cl 10.1 of the SPA, the plaintiffs are deemed to have notice of all requirements of the Government and the local authority. Furthermore, all such requirements shall be complied with by and at the expense of the plaintiffs.

[34] Under cl 10.2 of the SPA, the plaintiffs are deemed to have full knowledge of all matters affecting the land and the factory. In particular, under cl 9(g) of the SPA, the plaintiffs are aware that the certificate of fitness for occupation or the certificate of completion and compliance in respect of the factory has been issued by the relevant authority.

[35] Those provisions are clear and unambiguous. Based on the above-mentioned contractual provisions of the SPA, it is my finding that the responsibility to apply for planning permission and approved building plan in respect of the reconstruction of the factory lies on the plaintiffs. Having knowledge that a certificate of fitness for occupation or a certificate of completion and compliance was previously issued in respect of the factory, the plaintiffs should know that there could be governmental and local authority requirements that may similarly apply in connection with the rebuilding of the factory. Pursuant to cl 10.1 of the SPA, such requirements must be complied with by and at the expense of the plaintiffs.

[36] The supplemental agreement did not vary or alter the above-mentioned provisions of the SPA. Hence by virtue of cl 3 of the supplemental agreement, those provisions (and in particular, cl 10.1 of the SPA) remains in full force and effect and binding on the parties.

[37] If I am wrong and there is ambiguity, the contra proferentum rule ought to be invoked against the plaintiffs. The terms and conditions of the supplemental agreement and the SPA shall be construed against the plaintiffs. As those agreements were prepared by the plaintiffs' solicitor. This was admitted by PW2, the solicitor for the plaintiffs who prepared the SPA and the supplemental agreement, in Q&A 3 and 6 of his witness statement WS-PW2.

[38] I refer to the Federal Court case of *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440 at p 472; [2019] 10 CLJ 731 at p 762–763 which said:

[98] Coming to the *contra proferentum rule*, it provides that where a term is ambiguous, such *ambiguity ought to be construed against the party who prepared it*. In general contracts, common law courts have been quick to apply against 'unfair terms' like exclusion or exemption clauses. But the rule sees particular application in insurance contracts. This point is aptly summarised in *MacGillivray on Insurance Law* (12th Ed), at pp 317–318:

> The *common law rule of construction*, that *verba chartarum forties accipiunturcontra proferentum,* means that *ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it*. It has been said that a party who proffers an instrument cannot be permitted to use ambiguous words in the hopes that the other party understand them in a particular sense and that the court which has to construe them will give them a different meaning, but the ambiguity usually arises inadvertently from including conflicting standard printed clauses in the same policy.

[39] I accept D's assertion that it would be illegal for them to rebuild the factory without the requisite planning permission and approved building plans being in place. This is by virtue of s 19 of the Town and Country Planning Act 1976 ('the TCPA') which reads:

> (1) No person, other than a local authority, shall commence, undertake, or *carry out any development unless planning permission* in respect of the development has been granted to him under section 22 or extended under subsection 24(3).
>
> (2) Not withstanding subsection (1), no planning permission shall be necessary —
>
> (a) for the carrying out of such works as are necessary for the maintenance, improvement, or other alteration of a building, being works that affect only the interior of the building and do not —
>
> (i) involve any change in the use of the building or the land to which it is attached;
>
> (ii) materially affect the external appearance of the building;
>
> (iii) involve any increase in the height or floor area of the building;
>
> (iv) involve any addition to or alteration of a building that affects or is likely to affect its drainage, sanitary arrangements, or its soundness; or
>
> (v) contravene or involve or result in any inconsistency with any provision in the local plan;

[40] I accept that the reconstruction of the factory, which had been burnt down, amounts to a 'development' within the ambit of the TCPA. Development is defined in s 2 of the TCPA as follows:

> 'development' means the *carrying out of any building*, engineering, mining, industrial, or *other similar operation* in, on, over or under land, the making of any material change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands; and 'develop' shall be construed accordingly;

A ...

(3) For the avoidance of doubt in determining, for the purposes of this Act, what constitutes a *material change* in the use of a *building*, it is declared that —

(a) any increase in the number of units in a building to more than the number originally approved by any authority empowered under any written law to givethe approval involves a material change in the use of the building;

B

(b) the use as a dwelling-house of a building not originally constructed for human habitation involves a material change in the use of the building;

C

(c) any alteration or addition to that part of the building, whether in the interior or attached to the exterior of the building, that abuts upon any regular line of street as prescribed by or defined in any written law relating to buildings involves a material change in the use of the building;

D

(d) any use of a building or part thereof that contravenes or is inconsistent with or contrary to any provision of the development plan involves a material change in the use of the building;

(e) the use for other purposes of a building or part thereof originally constructed as a dwelling-house involves a material change in the use of the building.

E

[41] The plaintiffs claim that they are not in the position to apply for planning permission since they are not the registered owners of the land and the factory. However even without being the owners, the plaintiffs may still apply for the same.

F

[42] Section 21(2) of the TCPA envisages a non-owner applying for planning permission. It reads:

(1) An application for planning permission in respect of a development shall be made to the local planning authority and shall be in such form and shall contain such particulars and be accompanied by such documents, plans, and fees as may be prescribed.

G

(2) *If the applicant is not the owner of the land* on which the development is to be carried out, the written consent of the owner thereof to the proposed development shall be obtained and endorsed on the application.

H

[43] It must be pointed out that the plaintiffs have since become the registered owners of the land and the factory. In para 5.1 of their reply, the plaintiffs acknowledge that the registration of the transfer of the land in their names was completed on 7 September 2021. It is noteworthy that the date on which the plaintiffs became the registered owners of the land is prior to the cut-off date of 30 November 2021 stipulated in the supplemental agreement.

I

[44] My conclusion is this. Pursuant to cl 10.1 of the SPA, the plaintiffs are contractually obliged to submit the necessary application to fulfil the requirements of the Government and the local authority. There is no provision in the supplemental agreement that governs who is responsible to obtain the requisite consent and approval in connection with the reconstruction of the factory. As such, cl 10.1 of the SPA prevails.

[45] There is no provision in the SPA or the supplemental agreement that requires D to apply for planning permission and approval of building plan. Thus, it is the plaintiffs' responsibility to apply for the same under cl 10.1 of the SPA. The plaintiffs cannot compel D to do so. It was the plaintiffs' obligation all along.

Whether the plaintiffs, in failing or refusing to apply for planning permission and the approved building plan, have breached the supplemental agreement causing it to be impossible to perform whereby the supplemental agreement ought to be terminated

[46] In para 13(a) of the counterclaim, D prayed for the following:

> A declaratory order that the Supplemental Agreement dated 05-08-2021 entered into between the Defendant and the Plaintiffs is terminated, or alternatively void and is not enforceable.

[47] As noted earlier, the plaintiffs are not claiming specific performance against D to reconstruct the factory. The plaintiffs appear to adopt the stance that the supplemental agreement has been terminated. Although they claim that this is due to the 'anticipatory breach' and 'repudiation' on the part of D. Paragraph 9 of the SOC reads:

> As such, Defendant had breached the contractual relationship between Plaintiffs and Defendant and subsequently *anticipatory breach* has become an incompliance towards the root of the contractual relationship. This is because of the *repudiation* from Defendant ...

[48] In submissions, the plaintiffs stated that D's 'anticipatory breach of the Agreements had become a breach to the root of the contractual relationship between parties herein'.

[49] Be that as it may, I find that it was due to the breach of the plaintiffs that D is not obliged to perform its covenant to rebuild the factory. The plaintiffs' failure or refusal to apply for the requisite planning permission and approval of building plan have prevented D from carrying out the reconstruction and restoration of the factory. In arriving at this finding, I rely on the following provisions of the Contracts Act 1950.

[50] Section 54 the Contracts Act 1950 reads:

> Liability of party preventing event on which contract is to take effect
>
> When a contract contains reciprocal promises, and *one party to the contract prevents the other from performing his promise*, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

[51] Section 55 of the Contracts Act 1950 reads:

> Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises
>
> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its *performance cannot be claimed till the other has been performed*, and the *promisor of the promise last mentioned fails to perform* it, the *promisor cannot claim the performance of the reciprocal promise*, and must make compensation to the other party to the contract for any loss which the other party may sustain by the nonperformance of the contract.

[52] Section 68 of the Contracts Act 1950 reads:

> Effect of neglect of promisee to afford promisor reasonable facilities for performance
>
> If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the *promisor is excused by the neglect or refusal* as to any non-performance caused thereby.

[53] In *Leong Ah Kew v Prisma Suria Sdn Bhd* [2015] MLJU 713; [2015] 8 CLJ 300 at 320, the High Court said:

> [53] In summary, as the *plaintiffs have yet to perform their reciprocal promise* of evicting the squatters and demolishing the building structures on the said land, *their claim* for the termination of the JVA and forfeiture of deposit for *non-commencement of construction works by the defendant cannot succeed* and is therefore dismissed with costs. The defendant's counterclaim is accordingly allowed, subject only to the time period stated in the prayer for the plaintiffs to institute court proceedings for the eviction of the squatters and the demolition of their building structures within one month of this judgment, be extended to three months.'

[54] In the premises, I agree with D that the supplemental agreement could not be performed nor continued due to the plaintiffs' failure or refusal to apply for planning permission and approval of building plan. I also agree with D that the plaintiffs cannot take advantage of their own breach. The breach here being the plaintiffs' failure to comply with governmental and local authority

requirements as per cl 10.1 of the SPA.

[55] In *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 at pp 725–726, the Federal Court said:

> [52] In commenting on the *circumstances in which a person may disable himself from performing his promise* within the meaning of s 39 of the Indian Contracts Act (e*quivalent to our s 40*) *Indian Contract and Specific Relief Acts* by Pollock & Mulla (11th Ed) Vol 1 says at p 532:
>
> > The principle that in the absence of an express provision in a contract to the contrary it was not to be presumed that the parties intended that *a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach* (*Alghussein Establishment v Eton College* [1991] 1 All ER 267).
>
> ...
>
> [53] ... In the Court of Appeal in the New Zealand Shipping case (1917) 2 KB 717 at pp 723–724 Viscount Reading CJ said:
>
> > Unless the language of the contract constrains the Court to hold otherwise, the law of England *never permits a party to take advantage of his own default* or wrong. In *Malins v Freeman* (1838) 4 Bing NC 395 at p 399; 132 ER 839 at p 841) Coltman J said: 'It is *so contrary to justice that a party should avoid his own contract by his own wrong*, that unless constrained, we should not adopt a construction favourable to such a purpose.' That appears to me to be the true underlying principle of the case in which the word 'void' has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default.

[56] In *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 at 590, the Court of Appeal said:

> [10] ... It is a settled principle of general application that a *person should not be permitted to take advantage of his own wrong*. When applied in the sphere of contract law it expresses itself in the proposition that a *guilty party ought not to be permitted to take advantage of his own breach of the contract*.

[57] In seeking to compel D to obtain planning permission and approved building plan for the reconstruction of the factory, which is actually their responsibility, the plaintiffs are taking advantage of their own default. Due to the breach by the plaintiffs, I am of the opinion that D is entitled to put an end to the supplemental agreement. D's covenant to reconstruct the factory could not possibly be performed without the requisite planning permission and approval of building plan being applied for by the plaintiffs.

[58] I rely on s 40 of the Contracts Act 1950 which reads:

> When a *party to a contract has refused to perform*, or disabled himself from performing, his promise in its entirety, the *promisee may put an end to the contract*, unless he has signified, by words or conduct, his acquiescence in its continuance.

[59] Also as mentioned earlier, in para 9 of the SOC, the plaintiffs appear to accept that the supplemental agreement has come to an end. In the premises, I allow prayer 13(a) of the counterclaim and declare that the supplemental agreement is terminated.

Whether the plaintiffs are required to pay to the defendant RM250,000 being the balance purchase price under the sale and purchase agreement

[60] In paras 13(b) and 13(c) of the counterclaim, D prayed for the following:

> (b) A declaratory order that the Plaintiffs are not allowed to make any deduction on the balance purchase price of RM250,000.00 of the Sale and Purchase Agreement dated 28–05–2021 which is held by Messrs Gan Teik Chee & Ho;
>
> (c) The Plaintiffs shall jointly and severally pay or cause to pay RM250,000.00 to the Defendant forthwith.

[61] The balance purchase price is held by the plaintiffs' solicitor as stakeholder pursuant to cl 2(d) of the supplemental agreement. It is to be applied towards the LAD if D delays in delivering vacant possession of Part C and Part D of the factory together with the completion of its reconstruction and restoration works.

[62] In the SOC however, the plaintiffs did not claim for the LAD. Although P2 vide Q&A 9 of his witness statement WS-PW1 has testified otherwise as an afterthought. This is a deviation from the plaintiffs' pleading.

[63] In *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 6 CLJ 346 at 365, the Federal Court said:

> [72] It is established law that *parties are confined to their pleadings and courts are to decide on issues raised in them*. The confinement of issues within the four corners of the pleadings, amongst others, help the court identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly.

[64] Owing to the plaintiffs' breach of cl 10.1 of the SPA, my view is that they are precluded from claiming any damages from D by making any deduction of the LAD from the balance purchase price, taking advantage of

their own wrong. By failing or refusing to obtain the requisite planning permission and approved building plan, I am of the opinion that the plaintiffs are not entitled to claim the LAD that is to be deducted from the balance purchase price.

[65] I refer to the Federal Court case of *Sim Chio Huat* which said (at p 154 (MLJ); p 368 (CLJ)):

> ... in cases where an agreement contains *no clause for extension of time fo completion, the acts of prevention by the employer* whether authorised by the contract or whether *in breach* of it or whether the prevention is a cause of part or of the whole of the delay *invalidate the liquidated damages clause* because by such acts in the words of Parke B in *Holme v Guppy* and Lord Denning, MR in Trollope & Colls 'the *time becomes at large*'. Consequently there is *no date from which damages could run and therefore no damages could be claimed*.

[66] Moreover, upon the supplemental agreement being put to an end, it follows that the balance purchase price withheld thereunder must be released to D. In the premises, I allow prayers 13(b) and 13(c) of the counterclaim and order that the balance purchase price, presently in the hands of the plaintiffs' solicitor as stakeholder, be paid to D.

PLAINTIFFS' SUBMISSION

Trespass

[67] In para 10 of the SOC, the plaintiffs aver that D committed trespass 'by putting the machines, tools and belongings of Defendant' at Part A of the factory. In para 11 of the SOC, the plaintiffs claim aggravated damages on the assertion that D has 'earned some 'profit' from Plaintiffs because Defendant has saved rental costs to rent from other for the safe keeping of the said machines'. In submissions, the plaintiffs requested aggravated damages of RM1m.

[68] However the issue of trespass was not included in the plaintiffs' 'Issues to be Tried'. Further, in seeking a declaratory order against D for 'exclusive use and possession' of Part A of the factory, the plaintiffs appear to be taking the position that they do not have possession of Part A of the factory. How then can they claim trespass if they are in not in possession of Part A of the factory? After all, possession of land is necessary to support an action for tresspass.

[69] In *Senik v Hassan & Anor* [1963] 1 MLJ 368b at 370, the High Court said:

> The law of trespass is in my view also quite clear. Trespass is an injury to a possessory right. The *plaintiff must have been in possession at the time of the trespass*.

[70] In *Cahaya Utama Industries Sdn Bhd v Kong Kam Peng* [2007] 8 MLJ 528 at 536, the High Court said:

> [13] *Possession of the land by the plaintiff must be clear and exclusive to support any action for trespass* against the defendant. The plaintiff has failed to establish clear and exclusive possession of the land before the alleged encroachment by the defendant. In the circumstances, the plaintiff's claim for damages against the defendant for trespass is dismissed with costs.

[71] In any event, the plaintiffs have failed to prove trespass by D as alleged. In an attempt to establish trespass, the plaintiffs relied on the contents of a WhatsApp conversation between P2 and the purported representative of D. However the said WhatsApp conversation took place from 25 January 2021 until 7 August 2021. It cannot support the plaintiffs' claim for the alleged trespass because D is only required to deliver vacant possession of Part A of the factory on 30 September 2021. In short, the plaintiffs have no cause of action for the alleged trespass that occurred before 30 September 2021.

[72] In addition, the evidence suggest that any goods that was on Part A of the factory do not belong to D. The goods belong to the sister of DW1. It appears that the plaintiffs' claim for trespass is directed at the wrong party.

Planning permission and building approval

[73] There seems to be some confusion on the part of the plaintiffs as to whether planning permission and building approval is needed for the reconstruction and restoration of the factory. In para 5.4 of their reply, the plaintiffs aver that such approval is not necessary. It reads:

> Moreover, Plaintiffs also state that *approval from the authority, including but not limited planning and building approval is not needed* for Defendant to carry out repair works on the parts in the said Factory which has been damaged in the said fire incident *because Plaintiffs were not going to change structure of the said Factory* but only request Defendant to reinstate the parts of the said Factory that had been damaged in the said fire incident to its original position.

[74] Yet, the plaintiffs in this suit are seeking a declaration that D delivers vacant possession of the land and the factory 'together with consent and approval from the relevant authority for the purpose of any work'. If planning permission and building approval is not required, the plaintiffs would equally not be entitled to compel D to obtain the same. In which case, the said declaration sought by the plaintiffs cannot stand.

[75] According to the plaintiffs, that planning permission and building approval is not necessary is proven by DW1's admission during cross-examination that D had commenced fabrication works at Part B of the

factory.

Q: Saya rujuk anda kepada video ke-limabelas. Berdasarkan kepada video kelimabelas setuju dengan saya tak pekerja-pekerja Kejuruteraan Hock Kheng Sdn Bhd sedang membuat kerja-kerja kita panggil sebagai fabrikasi, fabrication work untuk truss, setuju atau tidak setuju?

A: Setuju.

Q: Setuju dengan saya kerja-kerja fabrication untuk pembinaan truss berlaku di atas *Blok B*, setuju atau tidak setuju?

A: Setuju.

Q: Saya cadangkan kepada anda selepas kebakaran syarikat anda memang pertama sekali ada buat kerja-kerja fabrication bagi truss untuk *membina semula bumbung-bumbung bagi bumbung-bumbung yang telah terbakar*, setuju atau tidak setuju?

A: Bukan semua sikit sahaja.

Q: Ada buat lah?

A: Ada buat.

[76] My view is this. First, that D had commenced works does not necessarily prove that planning permission and building approval is not required. It may simply be the case that such works were commenced without the requisite planning permission and building approval being in place.

[77] Second, DW1's response suggest that the works in question were confined to Part B of the factory and pertains to replacing the roof that had been burned down in the fire. However, the reconstruction and restoration works that are to be done seems to be concentrated on Part C and Part D of the factory. I infer this from two documents.

[78] The first document is the plaintiffs' counsel's notice of demand dated 10 February 2022 which states:

4. Subsequently, a Supplemental Agreement dated 05/08/2021 (hereinafter known as 'the said Supplemental Agreement') was entered and among others the crucial terms are reproduced:

...

4.2 All the *roofs of Part B* of the Factory need to be reinstated;

...

4.4 All the *replacement of pillars and columns according to law* shall be replaced in *Part C and Part D* of the Factory on or before 30/11/2022 and *welding or fabrication works* shall be completed on or before 30/10/2021 which shall be in original position.

[79] In the aforesaid notice of demand, the plaintiffs' counsel speaks of the 'roofs of Part B' of the factory having to be reinstated. The bulk of the work however relate to Part C and Part D of the factory. Where 'replacement of pillars and columns' and 'welding or fabrication works' need to be done. Interestingly, the plaintiffs' counsel stated that the works on Part C and Part D of the factory must be 'according to law'.

[80] The second document is the supplemental agreement itself. The only mention of any work pertaining to Part B of the factory is in cl 2(a)(i) which reads:

> 2. Reconstruction/Restoration of the damaged factory
>
> (a) The Vendor hereby irrevocably agrees to perform and complete the following reconstruction/restoration works at the Vendor's own costs and expenses before the Cut-off Date:
>
> (i) The Vendor shall *replace all pillars and columns* damaged in the said Fire Incident *between Part B and Part C* of the said Factory on or before the Cut-Off Date.

[81] The above-mentioned provision identifies the 'pillars and columns' that are to be replaced as being 'between Part B and Part C' of the factory. It does not specify any work to be done in Part B of the factory itself. In contrast, the supplemental agreement describes in some detail the work that is to be done to Part C and Part D of the factory.

[82] Clause 2(a)(ii) of the supplemental agreement reads:

> (ii) The Vendor shall complete the reconstruction/restoration of *Part C and Part D* of the said Factory according to the *plan and materials as per the attachments* herewith on or before the Cut-Off Date subject to the following arrangements:
>
> – The Vendor hereby covenants that the *welding/fabrication works* in respect of the *Part C and Part D* of the said Factory shall be completed on or before 31-10-2021 notwithstanding any movement control order, lock down or restrictive measures imposed by the Government of Malaysia.
>
> – The Vendor shall commence the *installation work* [shall commence] immediately after the completion of the *welding/fabrication*. However the Purchaser agrees to extend the Cut-Off Date in the event any movement control order, lock down or restrictive measures imposed by the Government of Malaysia on the area of the said Property is located which directly affects the *installation works* of the Vendor and such period shall be excluded from the computation of the Cut-off Date PROVIDED THAT all *fabrication works* in respect of the reconstruction of *Part C and Part D* of the said Factory have been completed in accordance with *plan and materials as per the attachments* herewith on or before 31.10.2021 ...

[83] Crucially, no evidence was led during the trial to prove the plaintiffs' assertion in para 5.4 of their reply that 'planning and building approval is *not needed* for Defendant to carry out repair works on the parts in the said Factory which has been damaged in the said fire incident'. Nor was any evidence tendered to prove the plaintiffs' assertion that they 'were *not going to change structure* of the said Factory'. Instead, the plaintiffs argue that it is D's duty to prove that planning permission and approved building plan is required — a point that is discussed below.

[84] In any event, the plaintiffs have asserted in their pleading the fact that planning permission and approval of building plan is required. Paragraph 7 of the SOC reads:

> In view of the said fire incident happened before the Completion Date of the said Agreement, Defendant being the Vendor of the said Agreement shall bear the risk pursuant to Clause 22 of the said Agreement. Furthermore, at the time the said fire incident happened, Defendant was still the owner of the land and the said Factory as well as the *consent and approval should be obtained first for any work including but not limited to building work, planning and building plan* (hereinafter referred to as 'the said needed consent and approval'). *Defendant has the full responsibility to obtain the said needed consent and approval* from the relevant authority before delivering vacant possession of the parts of the said Factory to the Plaintiffs.

[85] The plaintiffs contend that it is D's duty to prove that planning permission and approval of building plan is required. I disagree. As mentioned earlier, the plaintiffs have made a positive assertion in para 7 of the SOC that 'consent and approval should be obtained first' for the building work on the factory. Their claim is for a declaration that D delivers vacant possession of the land and the factory 'together with consent and approval from the relevant authority for the purpose of any work'. D's defence is that the plaintiffs are the ones who are responsible to obtain the said consent and approval, based on cl 10.1 of the SPA.

[86] Given such assertion and claim, the plaintiffs who assert the same are the ones with the burden to prove. This is based on s 101 of the Evidence Act 1950 which reads:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of *facts which he asserts, must prove that those facts exist.*

[87] The plaintiffs want the court to give judgment in their favour by ordering D to deliver vacant possession of the land and the factory 'together with consent and approval from the relevant authority for the purpose of any work'. Surely this must be predicated on the fact that such consent and approval, in the first place, is required.

[88] It is odd that the plaintiffs, who are demanding that D obtains planning permission and approved building plan, is now saying that it is D's duty to prove that planning permission and approval of building plan is needed. As a matter of fact, whether planning permission and approved building plan is necessary or not, was never included in the 'Issues to be Tried' document (Bundle D1 and Bundle D2) that was prepared and filed during pre-trial case management.

[89] During pre-trial case management, I directed the parties to file a common agreed 'Issues to be Tried'. But parties could not agree on a common document and filed separate list of issues. The list of issues filed by the plaintiffs (Bundle D1) reads:

'Plaintiffs' Issues to be Tried

1. Whether vacant possession by Defendant should be delivered together with consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan for Parts A, B, C and D of the said Factory to the Plaintiffs.
2. Whether Defendant is liable to pay damages and interests to Plaintiffs including but not limited to general damages, exemplary damages or aggravated damages.

[90] The plaintiffs' 'Issues to be Tried' says nothing about whether planning permission and approval of building plan is necessary. Actually, the list of issues filed by the plaintiffs essentially mirror the prayers in para 12 of the SOC. Interestingly para 12.1 of the original statement of claim that was filed on 17 March 2022 did not contain the words 'together with consent and approval from the relevant authority for the purpose of any work including but not limited to building work, planning as well as building plan'. Those words were added later on in the amended statement of claim that was filed on 10 May 2022.

[91] It seems to me that parties had proceeded on the premise that it is undisputed that planning permission and approved building plan is required. The only issue is this — who is responsible to obtain the planning permission and approval of building plan? In para 7 of the SOC, the plaintiffs aver that D is the one who is responsible for the same. In his defence, D avers that the plaintiffs are responsible for the same.

[92] The amended defence reads:

4(b) On the other hand, the *Plaintiffs qua registered owner of the Property have failed, refused and/or omitted to fulfill the requirements of the government and the authorities, inter alia, to obtain the approval of the planning permission and the approval of the building plan*. The Defendant is precluded from commencing let alone carry out the

construction work of the Factory as it is illegal to do so;

4(c) In fact, the Plaintiffs have neither issued any notice or demand nor notice to quit to the Defendant prior to the filing of this action and the Defendant was caught by surprise when the Plaintiffs did so while the Defendant is still *waiting for the Plaintiffs to fulfill the requirements by the government and the authorities in obtaining the approval of planning permission and approval of the building plan for the construction of the Factory*;

...

4(f) Therefore, the *Plaintiffs who have failed, refused and/or omitted to fulfill the requirements and to obtain the approval from the government and the authorities for the reconstruction of the Factory* as a precondition to the Supplemental Agreement shall be precluded from making allegations that the Defendant has breached the contractual relationship;

...

4(h) Pursuant to Clause 10.1 of the Sale and Purchase Agreement, the *Plaintiffs are responsible for obtaining the approval of the government and the authorities in the reconstruction of the Factory* ...

...

6(b) *All the mandates/requirements of the government and the authorities in respect to the Factory shall be complied with by the Plaintiffs* at the Plaintiffs' own expense pursuant to Clause 10.1 of the Sale and Purchase Agreement and *not the Defendant's responsibility*;

[93] As explained earlier, I have made a finding that the plaintiffs are the ones who are responsible for obtaining the requisite planning permission and approval of building plan.

TEMPORARY MEASURES FOR REDUCING THE IMPACT OF CORONAVIRUS DISEASE 2019 (COVID-19) ACT 2020 (ACT 829)

[94] In para 4(g) of the amended defence, D pleaded that the supplemental agreement cannot be enforced due to the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 *('*COVID-19 Act'). In submissions, the plaintiffs contend that the COVID-19 Act does not apply to the supplemental agreement. Their argument being that the supplemental agreement was drawn up to provide ancillary terms to the SPA, which is a sale and purchase of land transaction.

[95] First and foremost, since the plaintiffs in this suit are not enforcing the supplemental agreement by compelling D to rebuild the factory, the issue of enforceability of the supplemental agreement (in terms of D's covenant to reconstruct the factory) is irrelevant.

[96] Next, I am of the opinion that the COVID-19 Act can apply to the

supplemental agreement. Under the supplemental agreement, D undertook to reconstruct the factory. Included therein is D's covenant to carry out welding, fabrication, installation works and replacement of roof, pillars and columns. That, to my mind, makes it a construction work contract within the ambit of the COVID-19 Act.

[97] Section 7 of the COVID-19 Act reads:

> 7. Inability to perform contractual obligation
>
> The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.

[98] The 'list of categories of contracts' in the Schedule of the COVID-19 Act includes a 'construction work contract' as follows:

> 1. Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract.

CONCLUSION

[99] For the reasons above, I dismissed the plaintiffs' claim. The declaratory relief sought on their rights and interest over the land and their use and possession of the factory is purely academic. Given that the same was not challenged by D. Under the SPA and the supplemental agreement, D is not responsible for obtaining the requisite planning permission and approved building plan. That is the plaintiffs' contractual obligation.

[100] I allowed D's counterclaim. The plaintiff's failure or refusal to obtain the requisite planning permission and approved building plan has prevented D from performing the supplemental agreement ie to reconstruct the factory. The plaintiffs' breach of cl 10.1 of the SPA entitles D to put an end to the suplemental agreement. It also precludes the plaintiffs from claiming the LAD from the balance purchase price. Upon the supplemental agreement being put to an end, the balance purchase price ought to be released to D.

[101] I make the following orders. I declare that the supplemental agreement is terminated. I declare that the plaintiffs are not allowed to make any deduction against the balance purchase price. I order that the RM250,000 balance purchase price be paid and released to D forthwith. The plaintiffs shall procure the same to be done by giving the relevant instruction and

authorisation to their solicitor, who is currently holding the balance purchase price as stakeholder.

Plaintiff's claim dismissed and defendant's counterclaim allowed.

Reported by Nabilah Syahida Abdullah Salleh